



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: SEPTEMBER 29, 2022

IN THE MATTER OF:

Appeal Board No. 623774

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective December 28, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and, in the alternative, disqualifying the claimant from receiving benefits, effective December 28, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to December 28, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed May 12, 2022 (), the Administrative Law Judge sustained the initial determination disqualifying the claimant from receiving benefits, effective December 28, 2021, on the basis that the claimant voluntarily separated from employment without good cause and finding the alternate misconduct determination moot as a result.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as a station agent for a metropolitan

subway system for 15 years until December 29, 2021. As a station agent, the claimant interacted with the public from an enclosed booth in a subway station; she sometimes came into close contact with other employees or supervisors when they entered her booth. Beginning on April 23, 2020 and due to the pandemic, the employer instituted a mask policy which provided that all subway employees who interact with the public must wear a mask while in common areas of the subway system and anytime they cannot maintain six feet of distant from other individuals while carrying out their duties; the claimant was not required to wear a mask while working alone in the booth. The claimant was aware of the employer's mask policy.

The claimant has asthma which makes wearing a mask difficult when she is having an attack or has difficulty breathing. However, since the inception of the policy, the claimant wore a mask whenever a supervisor or another employee entering her booth asked her to do so and she could tolerate it given her asthma.

On or about December 24, 2021, the claimant was having difficulty with her asthma; she took her asthma medication but continued to have difficulty. The claimant's supervisor came into her booth and asked her to wear a mask. The claimant told her supervisor she could not wear the mask that day because of her asthma. The supervisor immediately took the claimant out of work for failing to wear a mask and told her to report to the employer's labor relations department. The claimant had applied for an exemption from the employer's overall Covid policies, including the mask wearing policy; the application was pending at the time of this incident. On December 29, 2021, the claimant was placed on an indefinite leave without pay for refusing to wear a mask in violation of the employer's mask policy and pending a decision on her exemption application.

**OPINION:** The credible evidence establishes that the claimant was discharged after she did not wear a mask when asked to do so by her supervisor in violation of the employer's mask policy. We note initially that as the claimant was placed on an indefinite, unpaid suspension, she is deemed to have been separated from employment. Hence, her separation was a discharge, not a resignation.

The claimant conceded that she did not comply with her supervisor's request to wear a mask. However, we accept the claimant's credible testimony which provides that she was not required to wear a mask when working alone in her

booth and which further establishes that she did not comply with the request because she was having difficulty with her asthma that day making it difficult to wear the mask. Under the circumstances, we find that the claimant had a compelling reason for not wearing a mask while in the booth with her supervisor. While an employer may discharge an employee for any lawful reason, including a policy violation, not all violations of an employer's policy constitute misconduct for Unemployment Insurance purposes. We find significant the supervisor's testimony that, prior to the incident at issue, the claimant had consistently complied with the mask policy and wore a mask whenever she was asked to do so. Accordingly, we conclude that the claimant's conduct does not constitute misconduct and her separation occurred under non-disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determinations, disqualifying the claimant from receiving benefits, effective December 28, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and, in the alternative, disqualifying the claimant from receiving benefits, effective December 28, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to December 28, 2021 cannot be used toward the establishment of a claim for benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER